

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**CIVIL ACTION NO. 2005-11348 and
NO. 2005-11603 (Consolidated)**

**JOSEPH SCHMITT,
Plaintiff,**

v.

**ROBERT MURPHY, ET AL.,
Defendants.**

DEFENDANTS' MOTION TO REMOVE DEFAULT

Defendants Robert Murphy, Superintendent – Massachusetts Treatment Center (“MTC”), Robert D. Clauss, Correction Officer – M.C.I. - Framingham, Duane MacEachern, Deputy Superintendent of Operations – Souza Baranowski Correctional Center, Kathleen Dennehy, former Commissioner of the Department of Correction, and Timothy Hall, former Assistant Deputy Commissioner Southern Sector, David Leonard, Correction Officer – MTC, Steven Fairly, Director of Security – MTC, Robert J. Waitkevich, former Deputy Superintendent – MTC, and Mark Dare, Correction Officer – MTC (collectively “Defendants”), hereby move the Court to remove the Default entered against them on May 21, 2007. As reasons therefore, the Defendants state as follows:

These consolidated cases are brought by the Plaintiff, Joseph Schmitt, a civilly committed sexually dangerous person at the MTC, who has initiated a myriad of lawsuits, in State and Federal Courts, against DOC and its various employees.¹ These cases are often accompanied by

¹ The following is a non-exhaustive accounting of the Plaintiff's litigation history since 2000:
State Cases: *Schmitt v. Shanks*, SUCV2001-00221 (Dismissed); *Schmitt v. DOC*, SUCV2002-00335 (Dismissed); *Schmitt v. DOC*, PLCV2006-00369 (Disposed, on Appeal); *Schmitt v. DOC*, PLCV2006-00490 (Dismissed); *Schmitt v. Murphy*, PLCV2006-01102 (Open); *Schmitt v. Dennehy*, PLCV2007-00090 (Open); *Schmitt v. Murphy*, WOCV2006-01972 (Disposed, on Appeal).

multiple requests for court orders, usually seeking a remedy for the Plaintiff's perceived denial of access to courts. In addition to these consolidated cases, counsel for the Defendants is currently handling several of the Plaintiff's litigations, including at least three State Court cases and a State Court appeal.

In this case, this Court issued the following order on February 14, 2007:

Plaintiff's motion (#13) to amend his complaint was allowed on 10/24/06. It has now been over three and a half months. Plaintiff is ordered to file his amended complaint by March 1. Otherwise, the order allowing him to amend will be revoked and the case will proceed on the original complaint. Defendants are ordered to file their answer by March 21. (Gertner, Nancy) (Entered: 02/14/2007).

The Plaintiff never did file an amended complaint in this case. While waiting for the Plaintiff to file an amended complaint, counsel for the Defendants mistakenly failed to file an answer.

Given the delay and ultimate failure to file an amended complaint, the Plaintiff can not now make a serious claim that the Defendants' delay in filing an answer has prejudiced him.

During the relevant period of this matter, the MTC Legal Division, of which the undersigned counsel is a part, has been seriously understaffed. The MTC Legal Division's supervising counsel (one of what was then five attorneys responsible for representing the Commonwealth of Massachusetts on all cases tried under M.G.L. c. 123A, § 9, as well as a full case load of state and federal civil rights cases) was on leave from late June, 2006 to January,

State Appeals: *Schmitt v. DOC*, 2004-J-00278 (Disposed); *Schmitt v. DOC*, 2006-J-0539 (Disposed); *Schmitt v. Chadowski*, 2007-J-0076 (Open); *Schmitt v. DOC*, 2006-P-1636 (Open); *Schmitt v. DOC*, SJ-2002-0363 (Disposed); *Schmitt v. Flannery*, SJ-2004-0147 (Transferred to Trial Court).

Federal Cases: *Schmitt v. USA*, 02-cv-10358-RWZ (Dismissed); *Schmitt v. Maloney*, 03-cv-11242-RCL (Closed); *Schmitt v. Maloney*, 03-cv-11386-RGS (Closed); *Schmitt v. Smith*, 04-cv-10451-RWZ (Stayed); *Schmitt v. Mulvey*, 04-cv-10717-RWZ (on Appeal); *Schmitt v. Carter*, 05-cv-10571-RWZ (Open); *Schmitt v. Loconto*, 05-cv-10572 (Dismissed); *Schmitt v. DOC*, 05-cv-10573-RWZ (Open); *Schmitt v. Murphy*, 05-cv-11348-NG (Open); *Schmitt v. Clauss*, 05-cv-11603-NG (Consolidated with 05-cv-11348-NG); *Schmitt v. DOC*, 05-cv-12580-RWZ (Dismissed); *Schmitt v. DOC*, 05-cv-12616-RWZ (Dismissed); *Schmitt v. DOC*, 06-cv-10569 (Open); *Schmitt v. Kennedy*, 06-cv-10766-RWZ (Open); *Schmitt v. Murphy*, 06-cv-11862-RWZ (Open).

Federal Appeals: *Schmitt v. Smith*, CA06-1778 (Closed); *Schmitt v. Mulvey*, CA06-2050 (Closed); *Schmitt v. Grossi*, CA06-2319 (Open).

2007. The MTC Legal Division was without a paralegal from September, 2006 to mid-May, 2007. Finally, in April, 2007, one of the five MTC Legal Division attorneys resigned, and her position has yet to be filled. These staffing issues have required the undersigned counsel to take on additional cases and responsibilities.

In addition, undersigned counsel has had a full schedule of trials under M.G.L. c. 123A, § 9. Since the Petitioner's motion to amend his complaint was allowed on October 24, 2006, counsel has represented the Commonwealth of Massachusetts in seven such jury trials: *Alfred Williams v. Commonwealth*, SUCR2002-11347, 10/23/06 – 10/27/06; *John Buder v. Commonwealth*, SUCR2005-10008, 11/14/06 – 11/20/06; *Donald Beeso v. Commonwealth*, SUCR2003-10167, 1/19/07 – 1/25/07; *Hugo Santos v. Commonwealth*, SUCR2005-10433, 3/5/07 – 3/9/07; *Stephen Pildade v. Commonwealth*, SUCR2003-11102, 4/4/07 – 4/10/07; *John Young v. Commonwealth*, SUCR2004-10997, 4/26/07 – 5/1/07; and *Randy Sargent v. Commonwealth*, SUCR2004-10514, 5/17/07 – 5/23/07. These trials are extremely fact-intensive, involve complicated psychological expert testimony, and require significant time to prepare.

Based on the above, Defendants' counsel failed to file an answer in a timely manner. Although regrettable, the failure was both inadvertent and excusable under the circumstances. The Petitioner can not state cognizable claim that he has been significantly prejudiced by the delay. The Defendants will file Answers to these consolidated Complaints by May 31, 2007, as ordered by this Court. The Defendants therefore move this Court to remove the default against them.

Respectfully Submitted
by Defendants,

NANCY ANKERS WHITE
Special Assistant Attorney General

by: s/ BRENDAN J. FRIGAULT
Brendan J. Frigault, Counsel
BBO No. 647669
Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, Massachusetts 02324
(508) 279-8185
FAX: (508) 279-8181

Dated: May 31, 2007

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the attached document to be served upon the Petitioner through intra-facility mail.

Joseph Schmitt, M81137
Massachusetts Treatment Center
30 Administration Rd.
Bridgewater, MA 02324

s/ BRENDAN J. FRIGAULT
Brendan J. Frigault

Dated: May 31, 2007